FILED
NOV 19 1953
HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

October Term, 1953.

No. 471

347 U.S.
ROG-SAC
35

FAMOUS ROGERS,

*Petitioner,*

*v.*

UNITED STATES ~~OF AMERICA~~ LINES.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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## INDEX.


| | Page |
|---|---|
| THE OPINIONS OF THE COURTS BELOW | 2 |
| JURISDICTION | 2 |
| QUESTION PRESENTED | 2 |
| SUMMARY STATEMENT OF THE MATTER INVOLVED | 3 |
| REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT | 7 |
| First Point. The Decision Below Is in Conflict With the Decision of the Court of Appeals for the Ninth Circuit in Petterson v. Alaska S. S. Co., 205 F. 2d 478 | 7 |
| Second Point. The Decision Below Is in Conflict With Basic Principles of the Maritime Law as Enunciated by This Court: Under the Maritime Doctrine of Seaworthiness a Shipowner May Not Circumvent His Absolute and Non-Delegable Duties With Respect to the Vessel and Its Equipment by Attempting to Delegate to a Longshore Contractor the Responsibility of Providing and Rigging Part of the Ship's Basic Gear Necessary to Unload Cargo | 10 |
| CONCLUSION | 25 |


10 1955

## TABLE OF CASES CITED.


| | Page |
|---|---|
| Aguilar v. Standard Oil Co., 318 U. S. 724 | 7, 11 |
| Alaska S. S. Co. v. Petterson, No. 287 | 7 |
| Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. Ed. 1208 | 12 |
| The Bill, 47 F. Supp. 969 | 23 |
| Brabazon v. Belships Co., 202 F. (2d) 904 | 9 |
| Cannella v. Lykes Bros. S. S. Co., 174 F. 2d 794, cert. den. 338 U. S. 859 | 15 |
| Domenices v. Monongahela, etc., R. Co., 328 Pa. 195 At. 747 | 23 |
| The Dredge No. 15, 264 Fed. 135 | 17 |
| Glover v. Compagnie Generale Transatlantique, 103 Fed. 2d 557 (C. A. 5) | 14 |
| Grasso v. Lorentzen, 149 F. (2d) 127 | 9 |
| Grillo v. Royal Norwegian Government, 139 F. (2d) 237 | 10, 18 |
| International Stevedoring Co. v. Haverty, 272 U. S. 50, 71 L. Ed. 157 | 12 |
| Larsen v. United States, 72 F. Supp. 137 | 10 |
| Lauro v. United States, 162 F. (2d) 32 | 10 |
| Lopez v. American-Hawaiian Steamship Co., 201 F. (2d) 418 (3 Cir.) cert. den. U. S. | 8 |
| Lynch v. United States, 163 F. (2d) 25, cert. den. 326 U. S. 743 | 10 |
| Mahnich v. Southern Steamship Company, 321 U. S. 96, 88 L. Ed. 661 | 8, 9, 17, 23 |
| The Edw. I. Morrison, 153 U. S. 196, 38 L. Ed. 688 | 24 |
| The Nako Maru, 1938 AMC 770 (E. D. Pa.), reversed on other grounds in 101 F. 2d 716, cert. den. 307 U. S. 641 | 14 |

**TABLE OF CASES CITED (Continued).**


| | Page |
|---|---|
| The No. 34, 25 F. 2d 602, 604 (C. A. 2) | 14 |
| The Omsk, 266 Fed. 200, 202 (C. A. 4) | 14 |
| The Osceola, 189 U. S. 175, 47 L. Ed. 764 | 8, 9, 10, 17 |
| Pacific American Fisheries v. Hoof, 291 Fed. 306, cert. den. 263 U. S. 712 | 17 |
| Petterson v. Alaska S. S. Co., 205 F. (2d) 478 | 8 |
| Read v. United States, 201 F. (2d) 904 | 9 |
| Rich v. United States, 177 F. (2d) 688 (C. A. 2) | 18 |
| H. A. Scandrett, 87 F. (2d) 708 | 13 |
| Schnell v. The Vallescura, 293 U. S. 296, 79 L. Ed. 373 | 24 |
| Seas Shipping Company v. Sieracki, 328 U. S. 85, 90 L. Ed. 1099 | 8, 9, 10, 11, 12, 13, 16, 17, 18, 23, 24, 25, 26 |
| Southern Steamship Co. v. N. L. R. B., 316 U. S. 31, 86 L. Ed. 1246 | 19 |
| The Southwark, 191 U. S. 1, 48 L. Ed. 65 | 24 |
| Shields v. United States, 175 F. 2d 743 | 18 |
| The Spokane, 294 Fed. 242, 244 (C. A. 2) cert. den. 264 U. S. 583 | 14 |
| Standard Oil Co. v. Robins Drydock & Repair Co., 25 F. (2d) 339 | 10 |
| Standard Oil Co. of California v. U. S., 59 F. Supp. 100, affirmed 156 F. (2d) 312 | 24 |
| Sutherland v. Buckeye Cotton Oil Co., 259 Fed. 909 | 17 |
| The Joseph B. Thomas, 86 Fed. 658, 660 (C. A. 9) | 14 |
| Uravic v. Jarka Co., 282 U. S. 234, 75 L. Ed. 312 | 12 |

## STATUTES AND AUTHORITIES CITED.


| | Page |
|---|---|
| Carriage of Goods by Sea Act, Title 46 U. S. C. Sec. 1303 | 20, 24 |
| Harter Act, Title 46 U. S. C. Sec. 190 | 20 |
| Modern Ship Stowage, 1942, United States Government Printing Office, published under the supervision of the Department of Commerce, Bureau of Foreign and Domestic Commerce | 20 |
| Title 28 U. S. C. Section 1254 (1) | 2 |
| Rules of the Supreme Court of the United States, Rule 38, Par. 5 | 2 |

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*v.*

UNITED STATES OF AMERICA.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner, Famous Rogers, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered on June 24, 1953, affirming the judgment of the United States District Court for the Eastern District of Pennsylvania, in the appeal docketed in the said Court of Appeals as No. 10,993.

## THE OPINIONS OF THE COURTS BELOW.

No opinion was filed by the District Court. The opinion of the Court of Appeals was filed on June 24, 1953 and is reported in 205 F. (2d) 57, appearing at R. 158-160.

## JURISDICTION.

This is a proceeding within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, and involves a claim for damages for personal injuries under the general maritime law.

The judgment of the Court of Appeals was entered on June 24, 1953 (R. 161). On September 10, 1953, the time within which to file the present petition was extended by Mr. Justice Burton to and including November 21, 1953. The jurisdiction of this Court is invoked under Title 28 U. S. C. Section 1254 (1) and Rule 38, Par. 5 of the Rules of the Supreme Court of the United States.

## QUESTION PRESENTED.

Where a vessel is temporarily berthed in port unloading cargo, and, because the ship's cargo gear is inadequate to the task at hand it becomes necessary to procure and install other unloading equipment, may the shipowner disclaim responsibility for the unseaworthiness of the substituted equipment, and thus escape his maritime obligation to provide a seaworthy vessel, by attempting to delegate to a contracting stevedore the responsibility of providing and installing such equipment?

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit involves a maritime claim for damages resulting from personal injuries sustained by petitioner, a longshoreman, while engaged in unloading a cargo of ore from respondent's vessel, the S.S. "Pioneer Tide". The trial before Judge James P. McGranery and a jury resulted in a verdict for respondent, and petitioner's motion for a new trial was denied without opinion by Judge Allan K. Grim (R. 136a), the Trial Judge having resigned in the interim. The Court of Appeals for the Third Circuit affirmed the judgment (R. 161). The question raised by the present petition arises out of certain claimed errors of law in the Trial Judge's charge to the jury. The facts, except where otherwise indicated, are not in substantial dispute.

The S. S. "Pioneer Tide" was owned, operated and controlled by respondent (R. 6a). When the vessel arrived in Philadelphia respondent engaged Lavino Shipping Company to unload its cargo of iron ore (R. 3a, 6a). Petitioner, a longshore employee of Lavino, was working in the No. 3 lower hold of the vessel assisting in unloading the cargo when he was suddenly struck in the back by an iron tub (R. 56a, 60a) suspended from wire winch runners attached to the ship's winches, sustaining serious injuries.

According to customary practice, most of the ore was unloaded by a crane gang, after which other Lavino "tub" gangs came aboard to complete the discharge of cargo (R. 62a). The "tub" gangs boarded the vessel about 7:00 P. M. on January 10, 1949 (R. 19a, 25a). Two of the gangs began working at the No. 3 hatch, one at the forward end of the hatch and one at the after end (R. 19a, 58a). Each gang had its own foreman, two alternating winch operators, a hatch tender (signal man) and ten men in the hold (R. 36a). Petitioner was one of the men working in the hold. At each end of the hatch the vessel was equipped with two

electric winches so placed that a single winch operator could work both winches (R. 20a, 37a). The iron tubs were loaded with ore in the hold, raised by means of the ship's winches, and unloaded into railroad cars on the dock (R. 20a, 40a).

All of the witnesses agreed that when the ore was being unloaded into railroad cars on the second or third track away from the vessel, as distinguished from the first track, it was necessary to substitute a land fall or house fall rig *since the ship's booms were inadequate for the purpose* in that they did not project a sufficient distance to carry the drafts to the more distant tracks. This is simply a block affixed to a tower some distance inshore from the vessel, used as a substitute for the inshore boom (R. 27a, 32a, 43a, 83a, 84a, 96a). When this is done it is necessary to remove the ship's winch runner from the inshore boom and its corresponding winch, swing the boom out of the way, and replace the ship's runner with a longer one, which in turn is then attached to the ship's winch and runs to the block on the shoreside tower and back to the cargo hook. The land fall was supplied and rigged by Lavino's men (R. 27a, 29a, 33a, 41a, 44a, 47a, 82a, 84a, 91a). Thus, where it is necessary to use the land fall rig, one runner (part of the ship's regular gear) goes from the off-shore winch up to the off-shore boom and thence down to the cargo hook, while the other runner (substituted by Lavino) goes from the inshore winch up and over to the tower block and thence returns, joining the first runner at the cargo hook (R. 27a, 41a). When, on the other hand, the ship's booms are adequate for unloading over the side of the vessel, the inshore boom takes the place of the land fall rig, and the ship's regular winch runners are used (R. 22a, 23a, 41a, 42a, 34a, 46a, 47a). In either event, one winch and runner controls the vertical movement of the cargo, and the other set controls its lateral movement (R. 22a, 23a, 26a, 38a).

By 9:30 P. M. the hold men at the forward end were gradually working back into the wings on each side of the

hold (R. 30a, 49a, 94a, 95a). An empty tub was being returned to the lower hold on the forward winches, and a signal was given from the hold to deposit the tub in the off-shore wing (R. 49a, 52a, 53a, 68a). In order to accomplish this maneuver, the winch operator "overhauled", i. e., reversed the winch controlling the side-to-side movement, so that sufficient slack would be available to enable the men in the hold to swing the tub into the off-shore wing (R. 52a). Suddenly, however, the tub reversed its direction and swung violently across the hold toward the inshore wing, striking the petitioner in the back (R. 56a, 68a) and inflicting serious injuries.

All of the witnesses agreed that the sudden reversal of movement of the tub was caused by a short winch runner, too short to reach the wings of the hold (R. 31a, 55a, 73a, 87a, 88a); that after this runner paid out to its maximum length it had rewound on the winch drum (R. 26a, 39a, 49a, 51a, 87a, 88a) so that instead of creating slack, it suddenly became taut, exerting a lateral force on the tub, and swinging it across the hold (R. 49a, 54a, 55a, 73a). The winch runners should be of sufficient length to reach all parts of the hold (R. 45a, 72a).

The only substantial issue of fact revolved around the asserted defense that the short winch runner which had caused the accident was the land fall rig, and hence not part of the ship's equipment. Plaintiff's witnesses, in explaining the set-up of the cargo gear at the time of the accident, had testified that the land fall rig was being used by the gang at the after end of the No. 3 hatch, and that the forward gang, with which petitioner was working, was using the ship's booms and winch runners (R. 25a, 27a, 40a, 41a, 59a). Defendant's witnesses, on the other hand, testified that the land fall was rigged at the forward end of No. 3 hatch (R. 82a, 90a, 29a, 93a), and therefore, that the short runner was the one rigged by Lavino. This issue of fact was submitted to the jury by the Trial Judge as being decisive on the question of respondent's liability.

(R. 105a-106a) "There is no question by anyone that this man was hit . . . But the question is what caused that tub to swing. What boom and what guy line or wire was that tub tied to? You have, on the one hand, the man who was operating the very winch or winches to tell you that it was the boom on the deck of the ship, the ship's booms. . . . But it does become important if it were the land boom, because there Lavino, his own employer, supplies that wire, and if that were the one, Members of the Jury, your verdict must be for the defendant. If, on the other hand, you decide and you come to the conclusion that it was the ship's gear then the ship is responsible and not the land boom, . . . That is the very heart of this whole case, Members of the Jury; you get rid of all the other and get right down to that."

This charge was supplemented by affirmance of respondent's Eighth Point for Charge:

(R. 113a) "If you find that the runner operated by Lowry at the forward end of the No. 3 hatch was furnished and rigged by Lavino and was too short for the purpose for which it was used, and that the accident was due to the use of a runner that was too short, your verdict must be for the defendant."

In view of the jury verdict for respondent it must be taken as established that the runner which caused the accident was the land fall runner procured and rigged by Lavino. The record therefore squarely raises the question presented by this Petition.

## REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

**First Point. The Decision Below Is in Conflict With the Decision of the Court of Appeals for the Ninth Circuit in Petterson v. Alaska S. S. Co., 205 F. 2d 478.**[1]

The decision below is predicated upon two major misconceptions, both resulting from the transposition of common-law concepts into the maritime field. While this is never articulated on the face of the opinion, an analysis of the Court's approach discloses that the result reached was measurably influenced by a particular way of looking at the maritime law, running as an undercurrent through the Court's thinking, which is in direct conflict with the nature of the juristic field in which the present problem originates.

The Court holds to the belief, first of all, that the land fall was rigged essentially for Lavino's own purposes (R. 159), a conclusion which can only be reached by ignoring the fact that the primary function of a cargo vessel is to carry cargo, and that unloading the cargo is an essential ingredient of the service which the ship performs. To approach the question at hand upon any assumption that unloading cargo is primarily the personal venture of the contracting stevedore, in which the ship has only an incidental and indirect interest, if any, is to fall victim to the same kind of myopia which this Court found it necessary to correct in *Aguilar v. Standard Oil Co.*, 318 U. S. 724, where it rejected the assumption that the uses and purposes of shore leave are "exclusively personal" to the seaman, and have no relation to the vessel's business.

Secondly, the Court below tests the respondent's liability for unseaworthiness on principles closely akin to the tort law of negligence (R. 159), and thus transmutes the

1. Petition for Certiorari filed August 24, 1953: *Alaska S. S. Co. v. Petterson*, No. 287.

maritime doctrine of seaworthiness from one of absolute liability, *Mahnich v. Southern S. S. Co.*, 321 U. S. 96; *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, to one dependent upon common-law culpability. Admittedly, says the Court, the unseaworthy condition was not created by the ship. The runner was owned, produced and fastened to the winch by Lavino. There is nothing to indicate that the ship sanctioned its use or even knew of its existence. That the vessel adopted the runner as an appurtenance is not justified by the record. The presence of the defective runner cannot be construed as the ship's responsibility since under *Lopez v. American-Hawaiian Steamship Co.*, 201 F. (2d) 418 (3 Cir.) cert. den. U. S. , the duty to provide a seaworthy vessel terminates at the time "control is relinquished" to the stevedore.

The decision below is in direct conflict with the Ninth Circuit's recent holding in *Petterson v. Alaska S. S. Co.*, 205 F. (2d) 478 (decided June 19, 1953, five days before decision was reached in the case at bar) and flies in the teeth of basic principles, firmly established by this Court, namely, that the obligation to supply a seaworthy vessel is "neither limited by conceptions of negligence nor contractual in character", and "is peculiarly and exclusively the obligation of the owner . . . *one he cannot delegate*": *Seas Shipping Co. v. Sieracki, supra*, at U. S. pp. 94-95, 100, and that the shipowner's duty is to "*supply* and *keep in order* the proper appliances appurtenant to the ship": *Mahnich v. Southern Steamship Company, supra*, at U. S .p. 104; *The Osceola*, 189 U. S. 158, 175.

In *Petterson v. Alaska S. S. Co., supra*, a longshoreman was injured by a defective block, brought on board by a stevedoring company, and used by the longshoremen to load cargo. In imposing absolute liability on the ship under the doctrine of unseaworthiness, the Court rejected the "relinquishment of control" doctrine adopted in the Second and Third Circuits. It pointed out that the doctrine had

its origin in the Second Circuit decision in *Grasso v. Lorentzen*, 149 F. (2d) 127, decided before *Seas Shipping Company v. Sieracki, supra*, when the basis of liability for defective equipment was, as to longshoremen, thought to be negligence rather than unseaworthiness, and that the courts which have persisted in holding on to this doctrine have failed to reckon with this Court's decision in Sieracki, *supra*, as well as with the essential nature of the doctrine of unseaworthiness as marked out by this Court in Sieracki, in *Mahnich v. Southern S. S. Co., supra*, and in *The Osceola, supra*. Finding the "relinquishment of control" doctrine to be based upon an incorrect major premise, the Court refused to apply it.

There is, moreover, a hopeless confusion *within* the Second and Third Circuits. Compare the present holding with the recent Third Circuit decisions in *Read v. United States*, 201 F. (2d) 904, and *Brabazon v. Belships Co.*, 202 F. (2d) 904. In the former, because of the non-delegable nature of the shipowner's duty to provide safe and seaworthy equipment, the vessel was held liable to a longshoreman injured because of inadequate lighting, despite the fact that under a contractual arrangement the duty to supply lighting facilities had been "delegated" to the longshoreman's employer. In the latter, a longshoreman was injured in the hold of the vessel when a board upon which he was walking collapsed. The board was not supplied by the ship and its origin was undetermined. The Court rejected the shipowner's principal contention (202 F. (2d) at 906) "that the hold having been safe when loading operations began, the shipowner thereafter has no affirmative responsibility whatever for shipboard hazards not of his own creation that may come into existence in the independent contractor's work area during the course of loading", and imposed responsibility on the vessel, holding that even as to liability for negligence the stated circumstances do not operate as a general rule of absolution from responsibility.

In the Second Circuit the same confusion exists. In one line of cases the Court holds that the shipowner's obligation of seaworthiness is limited to providing an *initially* seaworthy vessel, and terminates the moment "control of the vessel is surrendered to the stevedores": *Lynch v. United States,* 163 F. (2d) 25, cert. den. 326 U. S. 743; *Lauro v. United States,* 162 F. (2d) 32. As opposed to these cases is the opinion of Judge Learned Hand in *Lauro, supra,* where although concurring in the result because the ship was initially unseaworthy, he expressed the firm conviction that under the decision of this Court in *Seas Shipping Company v. Sieracki, supra,* and *The Osceola, supra,* the shipowner's duty continues throughout the period the stevedores are aboard the vessel. Consistent with this view is the Second Circuit decision in *Grillo v. Royal Norwegian Government,* 139 F. (2d) 237, where the sole defense to a longshoreman's action for personal injuries, sustained because of a defective ladder over the ship's side, was that the ladder was not shown to have been part of the ship's gear or to have been placed there by any authorized person on behalf of the ship. The defense was rejected. See also *Standard Oil Co. v. Robins Drydock & Repair Co.,* 25 F. (2d) 339, and *Larsen v. United States,* 72 F. Supp. 137.

**Second Point. The Decision Below Is in Conflict With Basic Principles of the Maritime Law as Enunciated by This Court: Under the Maritime Doctrine of Seaworthiness a Shipowner May Not Circumvent His Absolute and Non-Delegable Duties With Respect to the Vessel and Its Equipment by Attempting to Delegate to a Longshore Contractor the Responsibility of Providing and Rigging Part of the Ship's Basic Gear Necessary to Unload Cargo.**

Petitioner's cause of action is based upon the fundamental proposition that it is the shipowner's *absolute and non-delegable obligation* to provide the longshoremen en-

gaged in the ship's service with a safe and seaworthy vessel and equipment, and that consequently *the shipowner is not free to nullify his responsibility for the breach of this duty by parcelling out his operations to intermediary employers whose sole business is to temporarily take over portions of the ship's work while in port,* or by other devices which would strip the men performing its service of their historic protection. Translated into the context of the case at bar, this means that irrespective of the convenience or desires of the shipowner, the maritime law fastens upon him the responsibility for any defect or insufficiency of the unloading gear necessary to carry out the ship's enterprise, and that this responsibility may not be avoided by the commercially expedient device of parcelling out to shoreside contractors the various phases of the ship's business in port. *Whatever concurrent duty the law may impose upon these intermediary employers, and whatever concurrent fault may be attributable to them, the shipowner's responsibility remains constant and unaffected.* This proposition is spelled out in so many words by this Court in its landmark decision in *Seas Shipping Company v. Sieracki,* 328 U. S. 85, 90 L. Ed. 1099, which was the culmination of a long and troubled history in the field of litigation involving the rights of longshoremen against vessels by whom they were not employed, but for whom they were performing work essential to the vessel's enterprise, work which was formerly done, in the main, by seamen who were members of the crew. Without reviewing it in detail here, suffice it to say that its history is punctuated by numerous attempts on the part of the shipowners to nullify and restrict the scope of their liability, and to shift to others their traditional obligations. These attempts have been marked in the main by restrictive and artificial distinctions: "refinements" which, as this Court aptly characterized in a related connection, "cut the heart from a protection to which they are wholly foreign in aim and effect."[2] The attempts have

2. *Aguilar v. Standard Oil Co., supra,* 318 U. S. at 736.

generally failed before this Court, and before those federal appellate courts which rightly gauged the trend and policy of the decisions preceding Sieracki, particularly the decisions in *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. Ed. 1208; *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 71 L. Ed. 157; and *Uravic v. Jarka Co.*, 282 U. S. 234, 75 L. Ed. 312. As this Court in *Sieracki* pointed out (Footnote 16, U. S. p. 98, L. Ed. p. 1108): "It is in relation to liability for personal injury or death arising in the course of his employment on the ship that the policy of our law has been most favorable to the stevedore's claims." This policy, rooted in the practical necessities of the maritime trade, is based in great measure upon the realistic recognition that except for the technical aspects of the relationship brought about by modern specialization in the maritime industry, the harborworker, though intermediately employed, is in truth and fact a servant of the ship upon which he performs his labors, is subject to the same risks and hazards as are the members of the crew, and is as helpless to discover and avoid them; he is therefore entitled to the same protections so far as these are consistent with his relation to the vessel. This policy is predicated upon the further explicit recognition that any toleration of division of responsibility as between the ship and those intermediary employers who undertake to perform portions of the ship's work will result, in the first instance, in a progressive evasion of responsibility, and ultimately may leave the injured longshoreman without relief altogether.

Before the era of "increasing commerce and the demand for rapidity and special skill" (*Atlantic Transport Co. v. Imbrovek, supra*, 234 U. S. 52, 61, 58 L. Ed. 1208, 1213) virtually all of the ship's work, possibly excepting major structural repairs and alterations, was performed by the ship's crew. The traditional protections afforded the crew extended equally to the work of loading, unloading, repairing and refitting the vessel and were equally ap-

plicable whether the ship was at sea or in port. Upon proper performance of the work, whether navigational or non-navigational in character, depended in large measure the safe carrying of passengers and cargo and the safety of the ship itself. It was a service absolutely necessary to enable the ship to discharge its maritime duty. The ship was bound to furnish the crew with a reasonably safe place to work, and a safe and seaworthy vessel, an obligation which encompassed within its scope the diverse procedures involved in loading, unloading, repairing and refitting the vessel. As the need for specialization increased, shipowners developed the practice of hiring men for the specific purpose of tending to these non-navigational phases of the vessel's enterprise. In so doing the shipowner did not relieve himself of his traditional obligations, for these men, though not members of the crew, were doing precisely the work of the crew, as necessary to the accomplishment of the ship's enterprise as navigation itself. Rightly these men looked to the vessel for the safe accomplishment of their work; safe in a comparative sense, only, for, as graphically expressed in the *H. A. Scandrett*, 87 F. (2d) 708, 711: "A ship is an instrumentality full of internal hazards aggravated, if not created, by the uses to which she is put." No one is in a better position to take such proper and adequate means as will reduce the hazard as far as the nature of the instrumentality, and the enterprise in which she is engaged, will reasonably allow. As this Court said in *Sieracki, supra*, (U. S. p. 94, L. Ed. pp. 1105-1106): "Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in a position, as the worker is not, to distribute the loss of the shipping community which receives the service and should bear its costs." Thus it is that it has been the shipowner's traditional responsibility to provide those engaged in the ship's service, whether members of the crew or not, with a safe and seaworthy vessel, a duty which embraces within its scope a

safe place for the performance of the work,[3] as well as safe and proper equipment for its execution.[4] Nor has the present stage of maritime practice of hiring so-called independent contractors, who in turn are technically the employers of the men who now perform certain phases of the ship's non-navigational work, altered the legal incidents of the underlying relationship in the slightest degree. The shipowner's traditional obligation remains, and he cannot insulate his liability for its breach by the device of an intermediate employer, for the obligation is non-delegable. The device is of benefit primarily to the shipowner, who derives the advantages of specialized skill without increasing his maritime obligations. There are no reasons of policy to dilute these obligations, nor any considerations of equity which could possibly serve as a basis for permitting the shipowner to thus slough off his responsibilities.

Possession and control of a vessel are significant factors in the maritime law when considering questions of duties and liabilities. But the concepts which these terms represent are not the same as at common law, nor may the legal incidents flowing therefrom be indiscriminately applied in all circumstances. Under the classic example of a demise or bareboat charter the charterer assumes control of the vessel, is considered in law as owner pro hac vice, and is responsible in all respects as an actual owner in possession and control. The owner, on the other hand, having been divested of control, is relieved of such responsibilities, except for the obligation of providing a

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3. *The Joseph B. Thomas*, 86 Fed. 658, 660 (C. A. 9); *The No. 34*, 25 F. 2d 602, 604 (C. A. 2); *The Spokane*, 294 Fed. 242, 244 (C. A. 2) cert. den. 264 U. S. 583; *The Omsk*, 266 Fed. 200, 202 (C. A. 4).

4. *Glover v. Compagnie Generale Transatlantique*, 103 Fed. 2d 557 (C. A. 5); *The Nako Maru*, 1938 AMC 770 (E. D. Pa.), reversed on other grounds in 101 F. 2d 716, cert. den. 307 U. S. 641.

ship which is safe and seaworthy at the time of the demise.[5] The reasons for this rule are evident, and its consequences just and equitable. During the life of the charter the owner has no control over the ship, and has no means of ascertaining its seaworthiness, or opportunity to correct unsafe conditions arising after the demise. As a matter of practical necessity, this obligation must be assumed by the charterer, whose officers and crew man the ship, who has complete control over its movements, and who is the only one with the opportunity to maintain the vessel in a safe and seaworthy condition. If these duties were not to devolve upon the demise charterer they would, as a practical matter, disappear and maritime commerce would be seriously hampered.

This situation has not the remotest analogy to cases where the shipowner hires contracting shoreside employers to perform certain limited and transitory ship's work while the vessel is in port. There is here no demise of the vessel. There is no divesting of control. The master and officers of a ship in navigation are at all times in complete command and control of the vessel, which means all parts of the vessel. Indeed, it is a dereliction of their duty as officers to relinquish even momentary control. The shipowner, in parcelling out portions of the ship's work while in port does not demise to these intermediary employers those portions of the ship upon which the work is to be done, nor define its limits by metes and bounds. The intermediary employer is not a concessionaire carrying on his independent enterprise on demised premises under his exclusive jurisdiction and control. ***He is doing the ship's work on premises operated and controlled by the shipowner.*** Furthermore, in modern maritime practice it is customary to have employees of perhaps a half dozen separate intermediary employers on the ship at the same time, and while each performs different work, all of the work is related

5. *Cannella v. Lykes Bros. S. S. Co.*, 174 F. 2d 794, cert. den. 338 U. S. 859.

and carried on within the limited confines of the ship, in areas which either adjoin or overlap each other. To speak here of distinct spheres of exclusive control is to set up fictional jurisdictional boundaries which simply have no relation to fact.

For the convenience of the vessel and its efficient operation, a ship in navigation is customarily divided into three departments—deck, engine room and steward's. Each has a head responsible for the proper functioning of his department, and each has rather well defined boundaries. Yet all are inter-related and integral parts of the whole. It would be anomalous to speak of spheres of control here. Yet it is even more anomalous in relation to the longshore operations carried on when a ship is in port. It may as well be contended that if, at some future time, the shipowner should find it convenient to "farm out" the operations of the steward's department to a caterer, the engine room department to an engineering firm and the deck department to a contractor specializing in "deck" work, his continuing obligation to provide a safe and seaworthy vessel and a safe place to work will disappear (See comment on this very hypothesis in *Seas Shipping Co. v. Sieracki, supra,* at U. S. pp. 91-92). The maritime law is not so shaped to suit the convenience of the shipowner. Not his convenience, but his consent to the performance of the work determines his liability. In engaging contracting stevedores, shipowners often, for their own convenience, exact from them certain *contractual* obligations with respect to the performance of the work—this may range from the furnishing of equipment to observing various safety precautions. These contractual obligations are more often implied than expressed; frequently, they depend upon the vagaries of custom in a particular port. They are seldom defined with particularity, and even when the contract is in writing, questions of interpretation invariably arise when the imposition of liability hinges on its terms. While

this may be suitable and satisfactory as between the contracting parties, it is a precarious footing upon which to rest responsibility to third persons. That the shipowner finds it commercially expedient to farm out various longshore operations involved in a vessel's enterprise is understandable. To permit him, on this account, to escape his traditional responsibilities to the men who perform the ship's work would be indefensible:

> ". . . he is at liberty to conduct his business by securing the advantage of specialization in labor and skill brought about by modern divisions of labor. He is not at liberty by doing this to discard his traditional responsibilities. That the law permits him to substitute others for responsibilities peculiar to the employment relation does not mean that he can thus escape the duty it imposes of more general scope. *To allow this would be, in substantial effect, to convert the ancient liability for maritime tort into a purely contractual responsibility. This we are not free to do.*" (Emphasis supplied.) *Seas Shipping Co. v. Sieracki, supra,* 328 U. S. 85, 100, 90 L. Ed. 1099, 1109.

The shipowner's obligation to supply a seaworthy vessel and safe and seaworthy appliances is absolute and non-delegable. *Seas Shipping Co. v. Sieracki, supra; Mahnich v. Southern Steamship Company,* 321 U. S. 96, 88 L. Ed. 661; *Sutherland v. Buckeye Cotton Oil Co.,* 259 Fed. 909. It is likewise continuing in character, for, as this Court pointed out in the *Mahnich* case, *supra,* at U. S. p. 104, L. Ed. p. 567, quoting from *The Osceola,* 189 U. S. 175, 47 L. Ed. 764, the owner's obligation is to "supply and *keep in order* the proper appliances appurtenant to the ship." (Emphasis in the original.) See also *Pacific American Fisheries v. Hoof,* 291 Fed. 306, cert. den. 263 U. S. 712; *The Dredge No. 15,* 264 Fed. 135. To follow the "control" theory would require a holding that although the obligation

is non-delegable, it may nevertheless be delegated to intermediary employers, and that although the obligation of the owner is to *supply* as well as to *keep in order* the appliances appurtenant to the ship, this obligation ceases at the very moment when it becomes most necessary, that is to say, at the very moment when the ship and its appliances must be used for the purposes for which they are intended. Under the "control" theory the shipowner is thought to be relieved from the obligation solely and precisely for the asserted reason that during the time the intermediary employers are working aboard the ship he is deprived of control over the vessel and its appliances, that is to say, that the intermediary employer's "control" during these operations is such that it completely divests the owner of the ability to meet his obligations. Yet, had a member of the crew been injured under the circumstances here disclosed, instead of the petitioner, the shipowner's liability would have been clear for "The shipowner's responsibility to furnish a safe place for the crew continues *through any hazard created by longshoremen in loading the cargo . . .*" *Shields v. United States*, 175 F. 2d 743. This doctrine has in fact been equally applied to longshore workers: *Grillo v. Royal Norwegian Government, supra*, 139 F. 2d 237 (C. A. 2); *Rich v. United States*, 177 F. (2d) 688, 691 (C. A. 2). The truth of the matter is that both in fact as well as in contemplation of law, dominant control over the ship and its activities remains in the shipowner precisely because as to all matters relating to the ship's enterprise the right as well as the duty of ultimate management and control are firmly and irrevocably lodged in the shipowner. While a measure of control over the unloading gear was undoubtedly possessed by Lavino in the sense that its employees were handling it at the time of the accident, this is not the type of control which can legally divest the shipowner of his paramount and ultimate right of exclusive control, nor of the non-delegable obligations incident thereto. The test is not

whether, in the particular instance, control is actually exercised by the ship, but whether *the right of control* exists.

When a ship is temporarily berthed in port, its officers and crew do not and cannot abandon her. The master's authority is as complete and beyond question in port as it is at sea. *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31, 86 L. Ed. 1246. Consequently the shipowner, through the master, necessarily retains complete possession and control of the vessel as a whole and its activities, and although shoreside workers may be temporarily aboard engaged in performance of a phase of the ship's work, the ship's officers retain their normal shipboard authority and responsibility, and exercise supervision over the execution of the work. It is, therefore, the shipowner's burden, whose continuing status as operating owner must necessarily be inferred in the absence of evidence to the contrary, to establish, if he can, that when his vessel comes temporarily into a port during the course of its voyage, there is such a radical change in status and upheaval of normal shipboard authority on the part of its commanding officers, that the Court is justified in concluding that the duties and responsibilities incident to the operation of a vessel in navigation have, *as a matter of law,* been transferred from the owner to the shoreside contractor.

Not only is the present record barren of any suggestion to support such a conclusion; the affirmative proofs completely support the traditional relationship of the shipowner to his vessel. The vessel provides all the equipment needed by longshoremen to discharge cargo, including booms, winches, and winch runners (R. 34a, 71a). While the ship is at sea, the booms are lowered to the deck and rest in cradles (R. 71a). The customary practice for ships discharging cargo at Philadelphia is for the seamen to raise the booms into position over the hatches as the vessel comes up the river (R. 71a). The vessel maintains the winch runners and is supposed to make certain that they are greased, secured to the winches and are of sufficient length

(R. 71a). When the longshoremen begin work requiring use of the booms, they simply set them into the best position for the efficient handling of cargo (R. 65a, 71a, 78a, 90a). *While the vessel is being unloaded, the master and officers are in command of the operations and never relinquish control of any part of the vessel* (R. 74a). *During the work the Mate's authority is complete and he maintains supervision to protect the cargo, as well as the safety of the vessel and its personnel* (R. 77a, 78a, 80a). Congressional recognition of the fact that the loading, handling, stowage and discharge of cargo is the responsibility of the shipowner is embodied in the Carriage of Goods by Sea Act, which provides, inter alia, that the "Carrier (defined as the owner or charterer who enters into a contract of carriage with a shipper) shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." Title 46 U. S. C. Sec. 1303(2). By Section 1303(8) any agreement relieving the ship from liability for loss or damage to cargo, arising from negligence or from failure in the duties imposed upon the shipowner under the Act, is declared to be null and void. Similarly, under the first section of the Harter Act, Title 46 U. S. C. Sec. 190, it is declared unlawful to insert in any bill of lading or shipping document any clause or agreement purporting to relieve the manager, agent, master or owner of any vessel "from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care, or proper delivery" of any merchandise committed to the vessel's charge. The direct pecuniary gain to the shipowner, in the prompt, efficient and safe loading and discharge of cargo is universally recognized in maritime circles. A standard work on the subject of ship stowage and handling cargo [6] makes repeated references to this all-

6. *Modern Ship Stowage*, 1942, United States Government Printing Office, published under the supervision of the Department of Commerce, Bureau of Foreign and Domestic Commerce.

important factor. It points out (p. 6) that the methods employed in receiving and handling cargo at the ocean terminal are of the utmost importance to the shipowner, and may play a large part in determining whether or not his ships operate at a profit; that if the dock force (which is defined therein to include the *master and officers of the vessel*) is well trained and the cargo handling equipment is of the proper kind, the likelihood of damage to cargo is mitigated; that in actual practice the dock superintendent and his staff, the stevedoring organization, *and the ship's officers* work in close cooperation in the handling of cargo, and that in the North Atlantic Service *the ship's second officer, who is usually the cargo officer,* works with the dock superintendent and the chief stevedore, and in conjunction with the latter *supervises the handling and stowage of cargo.*

"For successful operation the ship's time in port, or its turn-around, must be as brief as possible. This is partly because all the major items of expense, with the single important exception of fuel, continue day in and day out whether the ship is at sea or in port. The crew's wages, the officers' salaries, and subsistence for the ship's company represent major operating expenses that must be paid for every day, . . . In addition, the overhead charges of insurance, interest on capital, and depreciation ordinarily amount to a considerable sum per day. Each day unnecessarily spent in port means, therefore, an outlay of money with no compensating income from freight moneys. The earning capacity of a ship depends largely on the rapidity of its turn around or the number of voyages it can make in a year, and the turn around can be increased to a large extent only by preventing delay in port. . . . If the work of the dock force is intelligently planned and efficiently executed, the ship's stay in port is reduced to the minimum possible number of days and hours, and the number of days during which the ship can be on the move carrying paying

cargo is correspondingly increased. It has been said, and with a considerable measure of truth, that there is no single point in the entire field of ship operation where efficiency of organization and management is so important in spelling profit or loss as in the work of the dock force in receiving, handling, loading, and stowing the company's ships." (ibid. pp. 6-7.)

If these realities of maritime commerce are accorded the significance they deserve, then the entire doctrine of "relinquishment of control" collapses from want of a foundation, and the basic premise upon which the decision below proceeds, namely, that unloading cargo is primarily the stevedore's business and is of no real concern to the ship, is seen to be wholly untenable. In brief, the proposition that the shipowner's duty to supply a seaworthy vessel and equipment terminates at the time "control is relinquished" to stevedores who discharge cargo stems from a complete lack of understanding of the nature of the doctrine of unseaworthiness as well as the character of the enterprise in which merchant vessels engage. We respectfully suggest that absent a demise of the vessel, or its withdrawal from navigation, the operating shipowner's dominion over the vessel and its undertaking is continuous and complete, and the legal obligations flowing therefrom can neither be terminated nor shifted.

In this view of the matter, it is of no consequence that the winch runner here involved was not initially part of the ship's equipment. For it was incorporated into the ship's loading gear not simply for Lavino's purposes, as the Court below has found, but primarily for the benefit of the ship. Without it the ship could not meet its obligation to properly unload the cargo, resulting at the same time in a breach of duty toward the cargo, as well as serious financial detriment to the shipowner. In a very real sense the ship adopted the runner as an appurtenance of the ves-

sel, and became its owner pro hac vice.[7]. The land fall runner was used because the ship's booms did not reach beyond the first track on the dock. That the ship and its officers were not cognizant of this limitation of its cargo gear, and were not aware of the necessity of using a land fall, is an assumption which cannot be indulged.[8] Under the circumstances, when Lavino was hired to discharge the cargo there was, at the least, implied authority to use whatever equipment was necessary to perform the job. But over and beyond this, the presence of the wire runner was the ship's responsibility because under the maritime law the shipowner's obligation of seaworthiness is to *supply* as well as to keep in order the appliances appurtenant to the ship, *Mahnich v. Southern Steamship Co., supra,* at U. S. p. 104, and this duty the shipowner is not free to delegate or to contract away. *Seas Shipping Company v. Sieracki, supra,* at U. S. p. 100. With respect to this absolute and nondelegable duty, the act of the stevedore is the act of the ship, for which the shipowner is as fully responsible as it

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7. This concept of adoption pro hac vice finds support even in common-law principles, and is applied in cases involving the liability of a railroad for defects in rolling stock being hauled over its lines. Exemplifying the rule in many jurisdictions is *Domenices v. Monongahela, etc., R. Co.,* 328 Pa. 195 At. 747, where the Court said:

> (p. 207) "The carrier's liability is not dependent upon ownership, it being immaterial whether the car belonged to the railroad company itself . . . or was received from a connecting company for transportation. . . . The reason is that when a company hauls a car over its own lines, it thereby, in theory, *adopts it as part of its own equipment, irrespective of the source from which it may have been received.*" (Emphasis supplied.)

8. "The shipowner and the crew must . . . be held to familiarity with the particular construction and design of the ship and its apparatus . . ." *The Bill,* 47 F. Supp. 969, 977.

would have been had the short runner been provided and installed by the ship's personnel.

It is the shipowner's responsibility to make his vessel fit for the carriage of goods undertaken. *The Southwark,* 191 U. S. 1, 48 L. Ed. 65; *The Edw. I. Morrison,* 153 U. S. 196, 38 L. Ed. 688. Since under the provisions of the Carriage of Goods by Sea Act, *supra,* "carriage of goods" is defined to cover "the period from the time when the goods are loaded on to the time when they are discharged from the ship," (Title 46 U. S. C. Sec. 1303 (e)), the shipowner's obligation toward the cargo continues throughout the unloading operation;[9] hence the shipowner's responsibility to make his vessel fit for the carriage of goods undertaken necessarily encompasses the equipment needed to unload the cargo. If the ship's appliances and equipment are inadequate to meet the necessities of the enterprise in which she is engaged, the vessel may well be considered as unseaworthy. In this view, all that really occurred here was the substitution of an unseaworthy land fall runner for an already existing unseaworthy condition.

As this Court pointed out in *Seas Shipping Company v. Sieracki, supra,* the unloading of cargo was traditionally the work of the crew, and it was only with the advent of modern cargo problems that the shipowners found it expedient to hire longshore contractors to undertake this job. Similarly, until comparatively recent times, all of the

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9. *Standard Oil Co. of California v. U. S.,* 59 F. Supp. 100, affirmed 156 F. (2d) 312.

In *Schnell v. The Vallescura,* 293 U. S. 296, 303-304, 79 L. Ed. 373, 377, this Court said: "In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes upon him. . . . The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care *and safe delivery* of which the law imposes upon him an extraordinary duty. *Discharge of the duty is peculiarly within his control.*" (Emphasis supplied.)

gear and tackle needed to discharge cargo was provided by the vessel as part of its regular equipment. Today, along with the practice of hiring longshoremen to assist in unloading the cargo, shipowners, on occasion, do not fully equip their ships with all of the cargo gear necessary to discharge the cargo, and in such cases, as in the situation at bar, they utilized and rely upon equipment supplied and brought aboard the ship by the stevedore, and made an integral part of the ship's gear for the benefit and at the implied instance and permission of the shipowner. The labor and equipment furnished by the stevedore are substitutes for ship's labor and ship's equipment. The shipowner does not escape his maritime obligations by contracting with an intermediary employer for ship's labor, and by the same token he cannot escape his liability for faulty gear by contracting with a stevedore to substitute a piece of equipment, owned by the stevedore, for basic ship's gear.

## CONCLUSION.

In the present state of the decisions in the Second, Third and Ninth Circuits there is urgent need for resolving the conflict by this Court. The question presented involves one of the most important principles of the admiralty law, and affects a broad segment of maritime workers. This Court recently said, in *Seas Shipping Co. v. Sieracki, supra,* that "It is in relation to liability for personal injury or death arising in the course of his employment aboard the ship that the policy of our law has been most favorable to the stevedore's claim." (328 U. S. at p. 98, footnote 16). The decision below runs counter to this benevolent policy, and is a step against the trend of the decisions of this Court. If permitted to stand it will constitute a serious inroad into the doctrine of seaworthiness, and will tend to transmute it from one of absolute liability to one dependent upon principles analogous to common-law negligence.

The same basic problem confronting this Court in *Sieracki, supra,* is again presented for resolution. There

the attempt to escape from the obligation of seaworthiness was formulated in terms of employees alleged to be "strangers" to the ship, that is to say, the contention there was that the doctrine is not available to maritime workers not members of the crew. Here, the problem is raised by the contention that the unseaworthy equipment was a "stranger" to the ship in that it was supplied by the longshoremen and not by the crew. The same basic considerations which disposed of *Sieracki* control the question here presented.

For all of the foregoing reasons, it is respectfully requested that this petition for a writ of certiorari be granted.

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*Counsel for Petitioner.*

2 No. 471

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HAROLD B. WILLEY, C

IN THE

# United States Court of Appeals

FOR THE THIRD CIRCUIT.

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## No. 10,993.

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FAMOUS ROGERS,

*Appellant,*

*v.*

UNITED STATES LINES.

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**Appeal from the Judgment of the United States District Court for the Eastern District of Pennsylvania.**

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# Appellee's Brief and Appendix.

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## TABLE OF CONTENTS OF APPELLEE'S APPENDIX.


| | Page |
|---|---|
| Excerpts from Testimony | 1a |
| **Excerpts from Plaintiff's Evidence.** | |
| William Anderson— | |
| Cross-Examination | 1a |
| Ralph Collick— | |
| Re-Cross-Examination | 3a |
| **Excerpts from Defendant's Evidence.** | |
| John Bucykowski— | |
| Direct Examination | 4a |
| Fred Davis— | |
| Direct Examination | 5a |
| Charles Royster— | |
| Direct Examination | 6a |
| Cross-Examination | 9a |
| Re-Direct Examination | 11a |
| Defendant's Reply to Plaintiff's Supplemental Motion for a New Trial | 12a |

## APPELLEE'S APPENDIX.

### EXCERPTS FROM TESTIMONY.

(2)* PLAINTIFF'S EVIDENCE.

* * *

(3) WILLIAM ANDERSON, having been duly sworn, was examined and testified as follows:

* * *

(17) CROSS-EXAMINATION.

By MR. COX:

* * *

(22) Q. It is also a practice in cases like these, that is, the unloading of this cargo, for Lavino to supply longer runners to enable connection with a house or a wharf pole or fall, isn't it?

A. Yes, they supply the house fall, yes.

Q. You do not know whether or not Lavino replaced or placed one of their runners on this winch in question, do you?

A. No, I don't.

Q. Did you say anything about this cross rigging?

A. No, I didn't.

Q. Well, did you think there was anything wrong with it?

A. No.

Q. Nothing dangerous about it, was there?

A. Not that I know of.

* * *

(23) Q. It could have been easily changed, couldn't it?

A. Yes.

* * *

Q. Who is the ship foreman employed by?

A. Lavino and Company.

* * *

* Figures in parentheses refer to page numbers of typewritten transcript of testimony.

Q. If you objected to any of the rigging your foreman would see that it was fixed?

A. Yes.

Q. You did not complain about this rigging to him?

(24) A. No.

Q. You didn't report it or complain about it to the ship crew, did you?

A. No.

Q. In this position that this winch driver is standing, you said something about that he could not look at the drums and into the hold; you meant at the same time

A. That is right.

Q. In other words, if you looked at the judge you could not see the jury?

A. That is right.

Q. But all the man had to do was to look this way (indicating) and he could see the drum, couldn't he?

A. Yes.

Q. Just turn his head?

A. Yes.

Q. Was anybody stationed by the drums of this winch or these winches by Lavino to tell the winch driver when he is getting close to the end of the cable?

A. No.

• • •

(27) Q. Could it have been Mr. Royster who operated this winch from seven to eight on the night in question?

A. It could have been. I mean I don't take note on who just operates when and where. It could have been.

Q. Did he have any trouble with the winch?

A. He didn't complain to me.

Q. Did he have any trouble with the runner?

A. No one complained to me about the runner, no.

Q. Nobody had any trouble with it?

A. I said no one complained to me about the runner.

Q. Well, in your knowledge, did he have any trouble with it?

A. No.

Q. Did anyone have any trouble with it after this accident?

A. No, they didn't.

Q. In other words, this is the only time to your knowledge that any one had any trouble with this runner?

A. Yes.

Q. How long did you operate these winches?

A. From seven at night until six in the morning.

• • •

---

(37) RALPH COLLICK, having been duly sworn, was examined and testified as follows:

• • •

(63) RE-CROSS-EXAMINATION.

By MR. COX:

Q. This house fall you are talking about, that is not the ship's runner, is it?

(64) A. No, that is Lavino's wire.

Q. This supervisor you are talking about, is that your ship's foreman?

A. Oh, he is above the ship foreman, he is over the ship foreman.

Q. Who is he employed by?

A. Lavino.

Q. Is he the one that decides whether or not to use a shore fall?

A. He handles the cargo and he handles everything.

• • •

(65) Q. Assuming it is available the use of a land fall is governed or supervised by some foreman from Lavino who is concerned with the unloading, is that correct?

A. Yes, that is correct.

• • •

(195) DEFENDANT'S EVIDENCE.

* * *

JOHN BUCYKOWSKI, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. COX:

Q. Where is your home, sir?

A. 1423 Marlborough Street.

Q. What is your present occupation?

A. Longshoreman.

Q. How long have you been a longshoreman?

A. Approximately about thirty years.

Q. Have you ever been employed by Lavino?

A. Yes.

Q. How long have you been employed by Lavino?

A. Since 1925.

Q. Have you ever been concerned with discharging ore from United States Lines ships?

A. Yes, sir.

* * *

(196) Q. Did you work on the ship at the time of the accident to Famous Rogers?

A. Yes, but I didn't see the accident though.

Q. What was your job on that ship?

A. I was a foreman of the hatch.

Q. What hatch?

A. No. 3 forward.

Q. You were the foreman of No. 3 forward?

A. Yes.

Q. And who was your deck hand?

A. Charles Royster and John Lowrey.

* * *

(198) Q. What other foreman was there present at that hatch?

A. William Anderson.

Q. And where was he working?

A. On the after end.

Q. Was he or was he not concerned with the operation of the forward winches?

A. No, sir, he didn't have anything to do with it.

Q. Mr. Bucykowski, who was your supervisor? Who was your supervisor on this night?

A. Why, a man named Lee Fowler, and I think the supervisor was Johnny Pride, if I am not mistaken.

Q. By whom are they employed?

A. By Lavino Shipping Company.

Q. The work that you perform as hatch foreman, what was that? Tell us what you did?

A. Well, when we get aboard the ship we make sure that the booms are secured and everything, and the guys and the preventers made fast before we do any operations, and after that we can start working.

Q. Who supervises your operation?

A. Why, the man that has charge of the ship, that is Lee Fowler.

• • •

(236) FRED DAVIS, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. COX:

• • •

(238) Q. Who was the foreman for the forward end of No. 3?

A. Well, his name is—I can't call him by his name because I don't know.

Q. What is his nickname?

A. Chinee we call him.

Q. Did he testify here shortly before you?

A. He did.

Q. Is his name Bucykowski?

A. Yes, that is what he testified his name was.

Q. When did you operate the winch of No. 3 aft?

A. I operated from seven until eight.

Q. Who was operating the winches opposite you at the forward end?

A. Charles Royster.

Q. Now, did you and he—or were you both relieved at the same time?

A. Yes.

• • •

(239) Q. Have you worked with these riggings of the land fall or the shore fall, have you worked with that?

A. Yes.

Q. Who rigs that?

A. Well——

Q. (Continuing) Customarily?

A. Customarily? Well, the deck men for the stevedoring company rigs it.

(240) Q. Does the ship rig it?

A. No, I haven't been on one yet the ship rigged.

Q. Who rigs it?

A. The stevedoring outfit rigs it.

Q. Who governs how they rig the ship for discharge?

A. The stevedoring foreman.

• • •

(244) CHARLES ROYSTER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. COX:

• • •

Q. In January of 1949 were you employed by Lavino aboard the SS "Pioneer Tide"?

A. I was.

Q. What was your job?
A. Winch operator.
Q. What winch did you operate?
A. I operated the forward winches.
Q. Of what hold?
A. No. 3.

• • •

(246) Q. Now, when you started using these winches, what did you do before you started your work?

A. Well, there is an old customary rule I use of my own, before I turn the juice on the winch to operate it I always look it over, look the wires over and look at the rigging to see there is nothing——

A. (Continuing) To see there is nothing halfway tied, it may come loose when I pick up a heavy load. Then I go into operation.

(247) Q. Did you do that on this occasion?

A. I did.

Q. Now, as you started to work what did you do?

A. When I started to work I looked down the hold and hooked on one tub and I went out with it and I came back in with it after it had dumped, and I looked back at my wires.

Q. What were you looking back at?

A. At the wires.

Q. The wires where?

A. On the drum.

Q. Why?

A. To see how much—how many turns would be left when you get to the lower hold.

Q. Why did you do that?

A. Well, sometimes it is a good idea to look at your wires to see if they are made fast on the drums. If they are loose it may come loose and hurt somebody, and therefore I looked at the wires. They were all fast, but the land fall cable I noticed didn't have enough turns on it to

reach all the way to the other side of the ship in the after end.

Q. That is, down at the bottom?

A. Down at the bottom.

Q. Now, you noticed that?

A. I did.

(248) Q. And did you take particular note of that condition of the runner?

A. Yes, if I had seen that either one of the hold men was going too far swinging the tub too far to the after end I would have told them to don't do it, to set it down and try to roll it or push it some other way because it might cause an accident.

* * *

Q. Did you operate the winch for this hour before John Lowrey took over?

A. I operated successfully and didn't have any trouble at all.

Q. Did you operate it the rest of the night at your regular (249) turns?

A. At the regular turns I did.

Q. Did you have any trouble?

A. No trouble.

Q. Did you have any trouble with the winch or the runners?

A. No.

Q. When you were relieved by John Lowrey did you report to him what you had discovered about the runner?

A. We always does that if we see anything we think may cause an accident or damage, we always warn the other fellow.

THE COURT: It is not what you always do. Did you report it to him this night?

THE WITNESS: I did.

By MR. COX:

Q. You did report it to John on this night?

A. Yes.

Q. What did you tell him?

A. I said, John, I said, watch this runner, I said, don't go too far on it the other way because it is a little short.

MR. COX: No further questions.

CROSS-EXAMINATION.

By MR. ALPER:

Q. When you have a short runner do you tell your hatch foreman about it?

(250) A. No, I didn't tell my hatch foreman about it because——

Q. I am asking—go ahead.

A. (Continuing) Because we were supposed to work the forward end, we wasn't working the after end, and it was long enough to reach the forward end.

Q. Was it long enough to reach any place in the forward end?

A. Any place in the forward end it would reach.

Q. You thought you had a short wire, you thought it was dangerous, didn't you?

A. I knew it was impossible for it to reach the after end because the after end of the hatch would be as far as from here to the back there, it was too short.

• • •

Q. If you have a short wire you are supposed to tell your hatch foreman, aren't you?

A. Well, if it is not too short, but this was short enough to reach where we were working—I mean long enough.

Q. Let us get the question again and let us get a yes or no answer. If the wire is short you are supposed to tell your foreman, aren't you? You can answer that yes or no.

A. Yes, if it is too short.

Q. You are?

A. If it is too short.

Q. Yes, and you didn't tell your foreman about it, did you?

(251) A. It was not too short for where we were working.

MR. COX: Let him explain it.

MR. ALPER: Just a moment.

By MR. ALPER:

Q. First of all did you finish your last answer?

A. It wasn't too short for where we were working. The size of that hatch is the distance of this building from this side to that side. So we were supposed to work half of that distance, and it was long enough to reach that halfway the distance in the bottom of the ship. If you go over the halfway the distance of this building then it would come to the end and wind back the other way.

Q. Now, it was short enough that you felt you ought to warn Lowrey about it, wasn't it?

A. Well, the reason why I warned Lowrey——

Q. Please answer my questions directly and then go on with your explanation.

THE COURT: He did say why he warned him, because it was dangerous.

MR. ALPER: All right.

By MR. ALPER:

Q. It was dangerous enough to warn Lowrey, wasn't it?

A. I felt that way.

Q. But it wasn't dangerous enough to warn the foreman, the (252) hatch foreman about it, is that your testimony?

A. That is right.

Q. And you didn't warn your hatch foreman?

A. I did not.

Q. And he is the man you should have warned, isn't he?

A. Well, if it was too short, yes, but it wasn't that short from where they were working, so I just told him, if they go over the mark from the after end section, if they

go over it, to watch it, don't go, but the hatch foreman gave the order to work half the hatch. He probably knew it.

• • •

(257) RE-DIRECT EXAMINATION.

By MR. COX:

Q. Mr. Royster, did you report to anyone aboard the ship, that is, any member of the crew or the officers concerning this runner that you have been talking about?

A. I did not.

Q. You said that this runner was long enough to do the work in the forward end of No. 3.

A. It was.

Q. What portion of No. 3 hold were you working in?

A. We were supposed to take half of the distance of No. 3.

Q. Was that forward or aft?

A. Forward.

• • •

## DEFENDANT'S REPLY TO PLAINTIFF'S SUPPLEMENTAL MOTION FOR A NEW TRIAL.

7. Defendant denies that it has knowledge sufficient to form a belief relating to the averment of the first sentence and demands strict proof thereof if material.

Defendant denies the averments of the second sentence.

Defendant denies that it has knowledge sufficient to form a belief relating to the averments of the third and fourth sentences.

8. Defendant denies the averment of the first sentence.

Defendant denies the averment of the second sentence.

Pertaining to the third sentence, the Interrogatories and Answers thereto are matters of record and speak for themselves; the averment that the witness was a "vital fact witness" is a conclusion which need not be answered.

9. Defendant denies that it is in the interest of justice and in fairness to both parties that a new trial should be ordered; the Plaintiff has had his day in Court and it is important that there shall be an end of litigation.

DEFENDANT REITERATES AND REALLEGES THE FOREGOING DENIALS AND FURTHER AVERS, UPON INFORMATION AND BELIEF, AS FOLLOWS:

10. Plaintiff's Answers to Defendant's Interrogatories received on January 28, 1952, which included "witnesses known", omitted reference to witnesses Anderson and Knox, whose testimony was introduced on behalf of the Plaintiff at the time of trial on February 4th.

11. Defendant further avers that the letter of T. R. White, Jr., Esquire, counsel for the Third-Party Defendant, dated over four months prior to trial, which is attached as Exhibit "A" to the affidavit filed in support of Plaintiff's motion for a new trial, merely states "the company (Lavino Shipping Company) is unwilling to undertake any further investigation in this matter . . .", and

"I do not know who was the foreman working the gang immediately prior to the accident." Plaintiff's reliance on said letter, and his voluntary refusal to take advantage of well known methods provided by the Federal Rules of Civil Procedure for discovery purposes, is not "diligence".

12. Plaintiff's witness Henry Knox, crane tender on the day shift, was a fellow employee of foreman Dave Harris, and was directly under his supervision.

13. Foreman Dave Harris was not in the employ of the Defendant nor in any way subject to its control or supervision; he was an employee of the Third-Party Defendant, Lavino Shipping Company, a party whose interest was adverse to that of the original Defendant.

14. Defendant further avers that the Third-Party Defendant answered Interrogatories addressed to it by the Third-Party Plaintiff setting forth the names and addresses of their employees performing services on the vessel during the period when the accident occurred. Defendant further avers that Plaintiff had knowledge of the contents of the Interrogatories propounded and the Answers filed.

15. Defendant further avers that the existence of foreman Dave Harris should have been known or discovered by exercise of reasonable diligence on the part of the Plaintiff.

KRUSEN, EVANS AND SHAW

By ROBERT COX
*Attorneys for Defendant.*

[fol. 155] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,993

FAMOUS ROGERS, Appellant,

v.

UNITED STATES LINES

PETITION FOR LEAVE TO PROSECUTE APPEAL WITHOUT PREPAYMENT OF COSTS AND CLERK'S FEES AND TO TYPEWRITE BRIEF AND APPENDIX

To the Honorable Judges of the Said Court:

The petition of Famous Rogers, by his attorneys, Messrs. Freedman, Landy and Lorry, respectfully represents:

1. That on July 24, 1950, petitioner commenced an action to recover damages for an injury sustained by him while working on board the S.S. "Pioneer Tide".

2. On November 26, 1952, following an adverse jury verdict, plaintiff's motion for new trial was dismissed and judgment was entered in favor of the defendant and against the petitioner.

3. On December 27, 1952, petitioner's notice of appeal was filed in the court below.

[fol. 156] 4. Petitioner now seeks leave to prosecute this appeal without prepayment of costs and clerk's fees and without being required to post security therefor, claiming the benefit of the Act of June 25, 1948, c. 646, 62 Stat. 955, 28 U. S. C. A., Section 1916, and to submit typewritten brief and appendix.

And your petitioner will ever pray, etc.

Freedman, Landy and Lorry, by William M. Alper, Counsel for Petitioner.

We hereby consent to the allowance of the within petition.

Krusen, Evans and Shaw, by Robert Cox, Counsel for Defendant.

[fol. 157] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,993

[Title omitted]

ORDER—Filed January 23rd, 1953

And now, to wit, this 23 day of January, 1953, upon consideration of the foregoing petition, it is

Ordered that leave to prosecute the appeal without prepayment of costs and clerk's fees and without the posting of security therefor is hereby allowed, and that appellant's brief and appendix may be typewritten.

By the Court: Goodrich, J.

[File endorsement omitted.]

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[fol. 158] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,993

[Title omitted]

STIPULATION PROVIDING FOR AN EXTENSION OF TIME WITHIN WHICH THE APPELLANT'S BRIEF AND APPENDIX MAY BE FILED AND ORDER APPROVING SAME—Filed February 16th, 1953

It is hereby stipulated by and between counsel for the parties that the time within which the appellant may file his brief and appendix in the above-entitled matter shall, subject to the approval of this Court, be extended to and including March 22, 1953.

Freedman, Landy and Lorry, by William M. Alper, Counsel for Appellant. Krusen, Evans and Shaw, by Robert Cox, Counsel for Appellee.

Approved by the Court: Kalodner, J.

[File endorsement omitted.]

[fol. 159] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,993

[Title omitted]

STIPULATION PROVIDING FOR AN EXTENSION OF TIME WITHIN THE APPELLEE'S BRIEF AND APPENDIX MAY BE FILED AND ORDER APPROVING SAME—Filed April 9th, 1953

Subject to the approval of this Court, it is hereby stipulated by and between counsel for the parties that the time within which the Brief and Appendix for the Appellee in the above-entitled matter shall be filed may be extended to and including May 12, 1953.

The reason this extension is requested is that counsel for Appellee has been engaged in the preparation of cases in the United States District Court, together with the press of other business, and has been unable to properly and ade-
[fol. 160] quately conduct the necessary research and to present the matter to this Court within the time allowed under its Rules. In addition, the transcript of testimony at the trial below is voluminous and there has been insufficient time to prepare and file an adequate Appellee's Brief and Appendix.

Freedman, Landy and Lorry, by William M. Alper, Counsel for Appellant. Krusen, Evans and Shaw, by Robert Cox, Counsel for Appellee.

Approved: Maris, C. J.

[File endorsement omitted.]

[fol. 161] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,993

FAMOUS ROGERS, Appellant,

v.

UNITED STATES LINES

Appeal from the United States District Court for the Eastern District of Pennsylvania

Before Goodrich, McLaughlin and Kalodner, Circuit Judges

OPINION OF THE COURT—Filed June 24, 1953

By McLAUGHLIN, Circuit Judge:

In this diversity action for personal injuries plaintiff appeals from the judgment against him and from the denial of his motions for a new trial.

On January 10, 1949, at a dock in Philadelphia, the S.S. "Pioneer Tide" was being unloaded of its cargo of ore. By 7:00 P. M. the only ore remaining was that in the wings of the hold. Special tub gangs of Lavino Company, the stevedoring contractor, were removing this. In that operation the forward gang, of which plaintiff was a member, was using one of the ship's booms, the stevedore's land fall, the [fol. 162] two ship's winches, a ship's runner on one of the winches and the land fall runner furnished by Lavino on the other one. The ore was shoveled into the tubs which were then hoisted up and off the ship into railroad cars on the dock. At about 9:30 P. M. one of the tubs unexpectedly swung across the hold and struck appellant. It seems now accepted by everyone concerned that the accident was caused by the land fall runner, operated at the time by a Lavino employee, rewinding on the winch drum which forced the tub to move as it did.

Appellant's objection to the trial court's charge and his sole reason for seeking to reverse the judgment below is based upon his contention that the land fall runner was

short and therefore defective. He claims that although the runner " * * * was originally provided by the stevedoring contractor, it was adopted by the vessel and incorporated with the ship's loading equipment and thus became an appurtenance of the vessel, with regard to which the ship had a continuing and non-delegable responsibility for its seaworthiness."

Admittedly then, the alleged unseaworthy condition was not created by the ship. The runner was owned, produced and fastened to the winch by Lavino, which was in charge of and performing the unloading operation. And there is no indication that the ship sanctioned its use or even knew of its existence. The statement that the vessel adopted the runner as an appurtenance is simply not justified by the record. In accordance with the well accepted practice the discharge of the cargo had been turned over to Lavino Company, an experienced master stevedore concern. The latter had taken the assignment and proceeded to carry it out. In the course of so doing and for its purposes it hooked up one of its own wires and thereafter used it in connection with the other rigging. While there is strong evidence of Lavino's negligence through its employees, particularly the winch operator, the resolution of that question [fol. 163] is not pertinent to this appeal. Since the wire alone or the manner in which it was handled, or both, caused plaintiff's hurts and since under the facts the presence of that wire cannot be construed as appellee's responsibility this judgment should not, for the reason urged, be disturbed. Lopez v. American-Hawaiian Steamship Co., 201 F.2d 418 (3 Cir. 1953), cert. denied June 8, 1953, U.S. .

Appellant's second point is that the district court erred in denying his motions for a new trial. The original motion was based on asserted newly discovered evidence. The supplemental motion charges that defendant concealed the identity of a crucial witness in its answers to plaintiff's interrogatories.

The evidence offered is that of Dave Harris, a Lavino foreman who, it is stated, rigged the land fall involved. There is no contention that he saw the accident. In his affidavit he states what they "always" did but evinces

no special recollection of the critical period except to say that he was foreman for the day gang which worked that day from 8:00 A.M. to 6:00 P.M. The accident, as already mentioned, did not occur until approximately 9:30 that night. Nine employees of Lavino, appellant among them, actually testified at the trial regarding factual matters connected with the accident including the unloading rigging, its operation, the discharge of the cargo and the accident itself. A review of that testimony makes it plain that the Harris evidence is cumulative and would probably not have changed the trial result.

The second reason is also devoid of substantial merit. At the time defendant's answers to plaintiff's interrogatories were served defendant had no knowledge of a witness named Harris and therefore did not mention him. Appellant, had he so desired, could have readily served other interrogatories thereafter but did not do so. In addition, Lavino Company was a party to the suit at the time the [fol. 164] referred to interrogatories were served and its interest was identical with that of appellee because of its workmen's compensation subrogation claim arising out of appellant's injury. The information concerning Harris would have been easily and properly obtainable from Lavino. Cf. Gibson v. International Freighting Corporation, 173 F.2d 591, 592 (3 Cir. 1949), cert. denied 338 U.S. 832.

We are entirely satisfied that the district judge committed no abuse of discretion in denying appellant's motions for a new trial. Beck v. Wings Field, Inc., 122 F.2d 114, 116 (3 Cir. 1941).

The judgment of the district court and its order of November 26, 1952 denying plaintiff's motions for a new trial will be affirmed.

[fols. 165-166] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,993

FAMOUS ROGERS, Appellant,

vs.

UNITED STATES LINES

vs.

LAVINO SHIPPING COMPANY, STEVEDORING DIVISION

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Goodrich, McLaughlin and Kalodner, Circuit Judges.

JUDGMENT—Filed June 24th, 1953

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case and its order of November 26, 1952 denying plaintiff's motions for a new trial be, and they are hereby affirmed, with costs.

[File endorsement omitted.]

[fol. 167] Clerk's Certificate to foregoing transcript omitted in printing.